carriers in order to protect consumers from unreasonable rate setting practices. The remaining question is what form the price caps should take. The OII poses two options for setting price caps: (1) use of existing rates or (2) a cost-based price cap.

The first option mirrors our existing framework for cellular carriers, but also clarifies the status of new entrants as non-dominant and not subject to price caps. Additionally, the OII proposal would provide for a mechanism for the relaxation of regulation when effective competition exists. This approach does little to actively lower rates, but relies instead on new entrants to place downward pressure on rates. Carriers who do reduce prices, however, would be permitted to raise them again up to the price cap without regulatory approval. Margin requirements would remain in place to prevent "anticompetitive squeezes" of independent resellers.

The other option suggested in the OII to regulate cellular carriers is a cost-based price cap. Under this option, the Commission would initiate a proceeding to determine a standard operating cost for cellular carriers and a market value for spectrum for each geographic area and an appropriate rate of return. Cost accounting allocations to separate retail from wholesale operations would also be addressed to avoid cross subsidization. We would draw upon the record previously developed in Phase III of I.88-11-040 to develop such cost allocations. An initial "true up" of rates would then be made based on the resulting revenue requirement adopted by the Commission. Cellular rates would become capped at this level, subject to a possible indexing mechanism. An index reflecting economy-wide price changes and perhaps adjustments for productivity improvements and exceptional events could be used.

1. **Positions of Parties**

The cellular carriers oppose price caps. First, they challenge the premise that underlying the rationale for price caps,

namely, that the industry is uncompetitive. This argument has already been rejected as discussed above. Carriers are especially opposed to cost-based price caps. They argue that federal preemption prevents implementation of cost-based price caps. The carriers claim that under Section 6002(b) of the Omibus Budget Reconciliation Act of 1993 (the Budget Act), states can petition to stay federal preemption only of rate regulation in effect as of June 1, 1993. Thus, the carriers argue that the Commission has no authority to impose any part of the proposed additional rate regulation measures described in the OII. Under the carriers' interpretation neither of the price cap measures set forth in the OII would be considered as "existing regulation" which was in effect on June 1, 1993.

The carriers further argue, however, that implementation of cost-based price caps would be a very complex, inefficient, and arbitrary undertaking, requiring an extensive expenditure of time and resources which would outweigh any purported benefits to be realized. By the time such proceedings had concluded, the carriers believe competitive markets would develop and the proceedings would produce obsolete results which would be rendered moot.

DRA agrees with the carriers that implementation of true cost-based price caps would require tremendous resources from all parties and would delay implementation of any unbundling requirement until the next century. Thus, while DRA does not endorse the cost-based price cap proposed in the OII as an immediate measure, DRA does endorse adoption of a price cap at current rates on a modified basis. DRA first notes that the OII's price cap proposals seem to apply only to wholesale usage rates. Yet, DRA argues that price caps must also apply to wholesale activation fees and access charges, as well. Otherwise, carriers could simply increase these latter charges to recoup any lost revenue from usage rate caps. DRA proposes that wholesale rates be capped at current levels minus the cost of access and

interconnection to the landline network. DRA states that the only factual evidence lacking for implementation of this modified price cap proposal is the actual landline and access interconnection costs of each carrier. Since these charges are negotiated and set out in contracts between the LEC and the cellular carrier, they should be relatively easy to identify. DRA proposes that dominant carriers and LECs be ordered to provide such cost information to all parties. DRA advocates that the price cap be adjusted only for an inflation index. Wholesale rates could not otherwise exceed price caps unless the Commission ordered a new investigation.

While a price cap at essentially current wholesale rates still imbeds duopolistic rents, DRA believes it offers a better overall solution than does the cost-based cap approach. DRA views its proposal as offering the opportunity for unbundling to occur without undue delay. By contrast, DRA believes it could delay implementation of rate unbundling for years if the Commission were to wait until it had completed detailed cost studies.

The carriers criticize DRA's price cap proposal to subtract the cost of access interconnection costs from wholesale rates as being arbitrary and without any factual basis. The carriers argue that DRA's unsupported conclusions require further examination through evidentiary hearings.

Resellers support the OII proposal for cost-based price caps. They argue that such price caps are needed to remedy the current overpricing of bottleneck services which include significant duopoly rents. They also propose that the accounting modifications to the Uniform System of Accounts (USOA) for cellular carriers as set forth in Appendix B to D.92-10-026 be reinstated and adopted in this proceeding. They contend that the USOA modifications which provide for allocation of costs between a carrier's wholesale and retail operations are needed to avoid cross subsidization and preferential pricing. CRA believes that concerns over the expenditure of time and resources required to undertake

cost-of-service studies can be mitigated by establishing priorities. For example, CRA recommends that the Commission give highest priority to unbundling and cost-basing the rates of the cellular markets in the two largest markets, namely the L.A. and S.F areas. Second priority could be given to establishing cost-based unbundled rates in adjacent areas and other markets where carriers' returns appeared excessive.

2. Discussion

We conclude that price-cap regulation is appropriate as part of our new regulatory framework during the interval until competition is sufficient to self-police the industry. Absent price caps, existing restraints on cellular rates would be removed, and rates may climb even higher. We recognize, however, that institution of cost-of-service studies is not a practical solution as way to derive cost-based price caps. As stated in the OII, we are extremely sensitive to the issue of implementation in considering the cost-based price option. We conclude that the expenditure of time and resources involved in embarking on cost-of-service studies would be excessive compared with the expected benefits. As explained by the carriers and DRA, such an undertaking would require resolution of complex questions such as how to incorporate spectrum value into the carrier's cost structure, and would be very time-consuming. Moreover, although we do not expect a competitive market to develop in the near term, competition could become a reality by the time required to complete detailed cost studies and to true up cellular costs. By that time, a cost-based price cap structure could become obsolete.

Likewise, we decline to reinstate the proposed USOA modifications which were initially adopted in D.92-10-026 but deferred for further consideration in this investigation by D.93-05-069. Our rationale for declining to adopt those USOA changes was stated in D.93-05-069, Ordering Paragraph 3b:

> "In D.90-06-025 (the Phase II Decision), we stated our intent to exert direct monitoring and control of cross-subsidzation on the part of wholesale carriers. To that end, we directed taht in Phase III, we would modify the [USOA] to incorporate methods of cost allocation between the carriers' wholesale and retail arms, for the specific purpose of policing predatory pricing. The basis for that policing, we said, was avoided cost....
>
> "However, technological change has been great since we issued the Phase II Decision...The impending entry of competitive non-cellular alternative carriers into the mobile telephone market will result in deep changes to the competitive aspects of the industry.
>
> "As a result of these changes, we hesitate to implement any USOA modifications at this time...Putting modifications in place would require much time and resources from the carriers and also from the Commission Adviory and Compliance Divison (CACD), which would be charged with the responsibility of reviewing the reports and with other monitoring duties.
>
> "Accordingly, we will reexamine the question of whether the potential for cross-subsidization will continue to be a problem, and the best method of controlling it, in the course of an investigation to be issued...[i.e., this OII]. (Pp. 12-13.)

We believe that the ability of cellular duopolists to engage in predatory pricing will ultimately be eliminated through the emergence of a competitive marketplace. In the interim period until competition creates a self-policing constraint, we recognize that the potential for cross-subsidization and anticompetitive behavior still exists. Nonetheless, the best solution is not to expend scarce resources in implementing detailed, time-consuming cost studies as discussed above. Rather, the best balance of interests and resources can be achieved through an approach with a more market-based perspective. Our solution is to adopt a program

of wholesale rate unbundling based upon prices capped at existing rate levels.

Before we adopt final rules, however, for a wholesale price cap policy, further consideration is warranted. We will consider in a subsequent phase of this investigation options for adjustments to existing price caps to restrain potential duopoly market power abuses while avoiding the need for cost-of-service studies. Potential options include further consideration of DRA's proposal as well as other alternatives. For example, we may also consider ways to adjust price caps referenced against excessively high rates of return of carriers.

For purposes of this interim order, we will retain our existing rate band pricing guidelines which cap rates at existing levels subject to downward flexibilty. Increases above capped levels require cost documentation as specified in Ordering Paragraph 9 of D.90-06-025.

Although we are deferring adoption of final rules for adjusting price caps at existing rates, we need not defer implementation of wholesale rate unbundling. In the following section, we address the issue of unbundling.

B. Market-Based Unbundling of Radio Links

As stated previously, the federal licensing of only two facilities-based cellular carriers in a given market places control of the radio "transmission bottleneck" into the hands of just those two carriers. We set forth our policy in the OII that the radio transmission spectrum controlled by duopoly carriers' should be made available on an unbundled basis separately from all other aspects of services they offer. Doing so would minimize the scope of the market bottleneck created by the duopoly structure for cellular licensing. In this way, the market power of existing cellular duopolists may be reduced, and competitive firms will be afforded an expanded opportunity to provide added value to cellular

consumers through more efficient or innovative landline network design and operation.

As set forth in our "Proposed Policies" in the OII-Appendix B.3, each dominant carrier would be required to unbundle the cell site radio segment of its operations from all landline network functions and ancillary functions for tariffing purposes. The listed functions to be unbundled included MTSO functions, backhaul from cell site antennas, telephone numbers, billing services, enhanced services, and other landline local or toll services.

We solicited parties comments in the OII as to the appropriateness of unbundling if the market is to become competitive in the future. We also sought input on how, if adopted, such unbundling should occur with special emphasis on costing and pricing issues. We expressed concern that to the extent that unbundling requires cost-based regulation, it may be incompatible with other regulatory framework options from which we might choose.

1. **Positions of Parties**

Cellular carriers attack the need for unbundling, arguing that it is premised on the existence of bottleneck facilities which they allege do not exist. They contend that bottleneck facilties require monopoly control of essential facilities. Yet, in the case of cellular, there are two carriers which control the facilities, hence, no bottleneck. Moreover, the carriers contend that the Commission has no legal authority to implement unbundling in light of FCC preemption and potential conflicts with federal standards.

Notwithstanding their disagreement with the premise that a bottleneck problem exists, cellular carriers further criticize the proposed unbundling plan outlined in OII Appendix B as being difficult, if not impossible, to administer. Concerning the list of functions outlined in Appendix B to be unbundled from the "radio transmission function," LACTC states the listing includes items

which are either technically "unbundleable" or which are already unbundled. LACTC claims that nothing in the record made in I.88-11-040 suggested that any signifcant MTSO or backhaul functions could be taken over by resellers. LACTC also disputes the statement in the OII that most of the "cellular network" mimics the local telephone network of a conventional local exchange carrier.

LACTC contends that resellers would not be able to take over the registration and validation functions performed by the MTSOs. While the reseller could record billing information in real time, LACTC argues that this would be superfluous since the carrier would still have to keep the same information for its own billing and technical purposes. Any doubling up by resellers of functions which must be performed in any event would add up to four seconds of processing time to each cellular call, according to the testimony in I.88-11-040. Thus, the most feasible point of contact between resellers and the MTSO is at some point between the MTSO and the rest of the network. At such a point of interconnection, the reseller switch could perform billing and other enhanced services mentioned in the OII. Yet, LACTC states that such services are already unbundled or could be unbundled at the request of any third party without any need for further Commission action.

McCaw argues that the Commission should not adopt a cost-based unbundled rate structure. Aside from legal and policy objections, McCaw contends that a cost-based structure would be exceedingly difficult to implement for competing cellular carriers which often have dramatically different costs. The necessary studies to implement such a system have never been done, and the procedures would need to be established by a federal/joint board pursuant to Section 410(c) of the Communications Act of 1934.

The cellular resellers (CRA and CSI) endorse the CPUC's proposed unbundling of wholesale tariffs. CRA cites Conclusion of Law 15 in D.92-10-026 that "The facilities-based carriers' rates

should be unbundled," and states that D.93-05-069, granting limited rehearing of D.92-10-026, did not change this conclusion. But CRA also states that mere publishing of unbundled rates will not ensure fair competition. There must be some assurance that competing providers can interconnect into the cellular carriers' systems on a basis that does not put them at a competitive disadvantage. CRA then cites the OANP Rulemaking[16] as an existing forum where open access and network architechture rules are being developed for the five largest local exchange telephone carriers and for AT&T.

CRA argues that interconnection for switch-based resellers to the duopoly cellular carriers' networks on rates, terms and conditions no different than their retail divisions and affiliates will: (1) promote wholesale and retail rate competition in California, (2) maintain just and reasonable rates, and rates that are not unjustly discriminatory, and (3) ensure the widespread availability of wireless two-way communications for all Californians.

CRA contends that, even in advance of rendering final conclusions on cost-based unbundling, the CPUC should now order the immediate unbundling of at least the market-based elements of existing wholesale tariffs. CRA notes that there are two levels of unbundling, and contends that the first level has already been authorized by D.92-10-026. CRA contends that this first level of unbundling can and should be implemented immediately without further regulatory consideration by unbundling the current tariffed access charges from the minute of usage charges. Accordingly, switched-based cellular resellers would only pay cellular carriers for radio channel time with a credit for switching and local exchange delivery functions corresponding to the currently billed

16 Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services (R. 93-04-003/I. 93-04-002).

access charge. The switch-based reseller would bypass the cellular carrier for the latter functions.

If a reseller were to establish its own switch, it would assume responsibility for number administration, obviating the need for some portion of the current number activation charge. This right to obtain numbers from the North American Numbering Plan Administrator was established in D.90-06-025 and reaffirmed in D.92-10-026. Such resellers would pay carriers an unbundled wholesale air-time charge. The existing mandatory reseller margins should correspondingly apply only to airtime rates after a one-year transition period from the time that switch-based resellers are actually offering service.

CRA characterizes the second level of unbundling as involving the development of cost-based rates for the separable functions of the cellular systems which can be addresed in a separate phase of this Investigation.

CSI and Comtech expect to become switch-based resellers as a result of this proceeding, and support CRA in seeking the immediate unbundling of cellular carriers' wholesale tariffs so they can implement switched-based interconnection with cellular carriers and compete on a level playing field. Like CRA, CSI believes that even before the cost basis of unbundled elements is determined, cellular carriers shoud be directed immediately to unbundle their existing market based rates.

CSI dismisses the alleged technical impediments to interconnection asserted by the cellular carriers as being unfounded. For example, CSI contends that the problem of registration and validation on Ericsson-designed systems cited by LACTC is a contrived one. CSI notes that validation is accomplished in an Ericsson switch by retrieving the mobile phone's home record. Once the switch has created a vistor record for a mobile phone, it does not need to query the home switch for subsequent validation. An Ericsson reseller switch would appear to

the LACTC serving switch exactly the same as any other of LACTC's five switches. (LACTC/McNelly R.T. at 1338/1339.) The reseller switch would retrieve the mobile phone's information and provide it to the LACT serving switch to perform its share of the validation process. The reseller switch would perform the recordation and billing function.

DRA also supports the principle of wholesale rate unbundling as a means of mitigating the market power concentrated in the hands of cellular duopolists and of enhancing competition. DRA recommends, however, that the unbundling requirement not apply to all dominant carriers, but only those who receive a bona fide request for unbundled wholesale services. DRA believes that it would be a waste of time and resources to unbundle wholesale services in rural markets, for example, where demand is too low to attact new providers.

2. **Discussion**

As an interim measure, we find no reason to delay the unbundling of the radio transmission bottleneck from other service functions based upon currently tariffed billing elements for those carriers in markets supported by sufficient demand and to the extent technically feasible. This limited measure requires no cost-of-service determinations since it allows cellular carriers to charge a market rate for these unbundled services. The record previously developed in D.92-10-026 and the comments filed in this Investigation form a sufficent basis to adopt this measure.

We have previously expressed our support for the concept of unbundling in D.92-10-026 in which we directed that switched-based resellers be allowed to purchase NXX codes directly from the LEC administrator of those codes, and to arrange landline interconnection directly with the LEC. In this manner, resellers would no longer be required to purchase bundled access numbers with airtime and other services from the cellular carriers.

Cellular carriers would have less power to control overall prices for cellular service and competition would be enhanced, carriers' denials that they have power to control prices through a "bottleneck" notwithstanding. Although we subsequently deferred implementation of cost-based unbundling as originally directed in D.92-10-026, we did not rescind our findings in D.92-10-026 at pp. 40-41 concerning the need for duopoly cellular carrier tariff unbundling.

This limited unbundling will enable switch-based resellers to acquire number blocks by ordering their own NXX codes and LEC interconnections as allowed under D.92-10-026, and avoid some charges to the cellular duopolist. Instead, switch-based resellers will pay for the direct costs of interconnection of their switches to the cellular MTSOs and maintain their own connections to the local exchange carrier.

Likewise, although the cellular carriers raise questions about what functions a reseller switch can or cannot perform, it is not necessary to determine precisely the technical capabilities of a reseller switch in order to implement the market-based unbundling adopted in this order. We acknowledge, as McCaw points out, that the equipment is not yet available to implement switching functions out to individual cell sites. Thus, the unbundling at this level is premature at this time.

We acknowledge that the reference in Appendix B.3 of the OII to unbundling of the "cell site radio segment" of carriers' operations is erroneous. As noted by CRA, we amend the reference to call for unbundling of the cost of the "bottleneck communications radio channel."

The reseller switch, as proposed by CSI, will not interfere with any of the "unitary" functions performed by the cellular carrier's MTSO. As CSI notes, the reseller switch will not actually switch and route the call on the wireless side, which remains the prerogative of the licensed carrier. The call will

continue to pass through the cellular carrier's MTSO(s). The reseller switch will identify mobile telephones with its NXX and will perform the billing, validation, and recordation function for calls to or from those telephones. As the FCC letter to CSI indicates, such functions are not "unitary" or technically preempted for federal purposes.

Contrary to the view of the cellular carriers, we do not interpret Section 332 of the Communications Act as prohibiting any modifications in specific state regulatory rules and procedures until the FCC acts on the CPUC petition to retain jurisdiction over mobile service carriers, which must occur by August 10, 1995. As stated in the FCC Second Order and Report (Sec. III F.2), it is the authority to regulate, not the specific rules in effect at some point in time which is subject to extension pending a ruling on the petition.

Moreover, there is no federal statute, policy, or rule that inhibits the interconnection and use of the reseller switch, as described in D.92-10-026. This is confirmed by the September 26, 1991 response of the FCC to CSI regarding CSI's query as to the legality of interconnection of a reseller switch to the LEC facilities and to the MTSO of the local cellular carrier. (Attachment A of CSI Reply Comments.) As cited by CSI, the record in I.88-11-040 indicates that there is no significant delay in call set-up time due to a reseller switch. (US West/Simpson R.T. at 1133; CSI/Raney R.T. at 775.)

In any event, we have already addressed the issue of the technical feasibility of the reseller switch in D.92-10-026 and need not relitigate the matter, as we stated in granting limited rehearing in D.93-05-069. In D.92-10-026, we acknowledged that CSI's reseller switch proposal at that time left unanswered questions concerning the specific design and method of interconnection which its switch would use. Nonetheless, we did not require resellers to prove the technical feasiblity of their

proposed switches, just as the facilities-based carriers are not required to do so when they install a switch. We stated our reliance on market forces and technological advances to influence when resellers decide they are ready to move into the market as switch resellers. Our D.92-10-026 Finding 47 still applies that:

> "There is no incentive for resellers to install a switch that is not technically and economically feasible and which cannot communicate with the switches of facilities-based carriers."

As a means of implementing our unbundling policy, we shall adopt DRA's recommendation that unbundling only be imposed for those dominant carriers who receive a bona fide request for unbundled service. As explained by DRA, a bona fide request must be accompanied by a construction or engineering plan describing how the provider would interconnect with the dominant carrier's MTSO. The interconnection plan would have to demonstrate the compatibility between the reseller's switch and the dominant carrier's MTSO.

Once a bona fide request for unbundled service is made, resellers would then follow the procedure as previously outlined in D.92-10-026:

> "Those resellers that want to provide switching services currently being provided by facilities-based carriers should file a petition to modify thier current certificate of public convenience and necessity (CPCN) to operate as a switch reseller. One purpose in modifying the the CPCNs is to eliminate any language in the current CPCNs that prohibits resellers from operating facilities. A second purpose is to ensure compliance with the California Environmental Quality Act (CEQA). As part of its petition to modify, a reseller must compy with Rule 17.1 and include a Proponent's Envirnomental Assessment (PEA) as part of its filing for review by Commission staff. Resellers are reminded that cellualr facilities they wish to install subsequent to that covered in the CPCN modification

> proceeding are subject to General Order 159." (P. 32.)

B. Extended Area Service Concerns

Extended area service (EAS) refers to service rendered to a subscriber of another carrier's system while the subscriber is "roaming" outside his home carrier's system. The subscriber's home carrier re-rates other systems' widely differing roaming charges so that its subscriber pays a predictable roaming rate. Under our current policy, cellular carriers are granted authority to charge EAS, or roaming, rates for one year on a provisional basis, provided that the proposed rates are revenue neutral. After one year, carriers can file an application to make the rates a permanent part of their tariff.

McCaw filed an application requesting permission to set permanent roamer rates (A.93-01-034). In that proceeding, the ALJ issued a ruling on February 18, 1994 stating that before the McCaw or similar applications could be granted,

> "...the legal issues raised in the OII need to be resolved, and the wireless OII now appears to be the most appropriate forum for doing so."

In accordance with the ALJ ruling, we shall resolve in this interim order the outstanding issues regarding EAS, such that outstanding applications to set permanent roamer rates for EAS service can be ruled upon.

As stated in the OII, EAS rules and practices should be consistent with our regulatory framework goals of stimulating market competition while protecting the public from anticompetitive behavior and abuse of market power. As noted in the OII, some contend that EAS results in cellular carriers reselling toll service without authorization and setting rates outside its geographic area. Others, have contended that EAS is anticompetitive.

We solicited parties' comments on the extent to which current EAS policies and practices are problematic or require change, and the long term effects of EAS on cellular rates and competition. We also solicited comments on the benefits offered by EAS for customers and providers.

1. **Positions or Parties**

LACTC notes that the Commission has before it several applications seeking authority for carriers to "re-rate" charges for their own customers when they roam into other markets, including McCaw's A.93-01-034. LACTC believes that if a carrier is willing to absorb a part of such charges for competitive reasons, thereby reducing the overall bill to the end user, the Commission should not hesitate to permit such rerating.

McCaw notes that a carrier's authority to re-rate roaming charges may be unclear because cellular CPCNs typically permit a carrier to construct facilities only in its cellular license area. McCaw does not believe this restriction should affect cellular EAS since no construction of facilities is involved in rendering EAS. McCaw proposes that the Commission simply clarify that mobile service providers are authorized to charge for EAS throughout the state, even though their FCC-defined service areas limit the territory where they may operate radio systems. Alternatively, the CPCNs could be amended to allow for cellular EAS.

DRA is concerned that the roaming rates set outside a carrier's service area may result in rate increases for some customers. For example, under some EAS rate structures, high volume callers or high per-minute callers could receive rate increases. DRA is also concerned that home carriers in some cases may charge its customer less than it is being charged by the foreign serving carrier, and then pass the loss on to the customer indirectly through rate increases for other services. Otherwise, home carriers who are small might be placed at an unfair disadvantage if they had to absorb losses due to differences in home versus foreign carrier rates, and might not be as able to provide similar service offerings as large carriers.

DRA proposes that all roaming customers should pay equal rates within the boundaries of a single service area to avoid discriminatory rates. DRA also believes uniform rates for roaming should be set for adjacent service areas within a predetermined radius as a way to simplify the roaming rate structure. DRA believes that carriers should only be allowed to set roaming rates within the service areas designated by their CPCNs to avoid possibilities of rate discrimination and unfair rate increases.

CRA expresses concern over the fairness of EAS billing practices with respect to resellers. Although resellers' customers roam in the same way as those of duopoly carriers, resellers receive a share of billed roaming revenue only with certain duopoly carriers. CRA finds this practice inconsistent with Commission findings in D.92-10-026 that resellers are to be treated like cellular carriers for interconnection purposes and to share in roaming revenues. CRA further states that duopoly cellular intercarrier roaming agreements have not been publicly filed, contrary to Commission requirements (OII of PT&T, D.50837). In considering allowing EAS, CRA proposes the Commission (1) enforce the requirement that intercarrier agreements be publicly filed; (2) require any serving carrier charge a wholesale rate to the served carrier (including switch-based resellers with their own NXX codes) as well as its nonswitch-based resellers; and (3) require the served carrier only bill the reseller precisely the amount billed it by the serving carrier.

CRA states that AT&T/McCaw have already agreed to such an arrangement as part of a settlement with CRA in A.93-08-035 wherein resellers are accorded a margin on roaming which is superseded under wholesale tariffing arrangements among facilities-based carriers "so long as cellular resellers are accorded the same rates terms and conditions of that arrangement as are provided McCaw/AT&T and so long as the rates, terms, and conditions are no less favorable than those provided hereunder." CRA proposes that those settlement terms be made industry wide as part of this Investigation.

2. Discussion

While we are interested in promoting a policy of EAS pricing which is conducive to competition, we are also concerned with the need to protect subscribers against hidden bill increases or discriminatory billing practices.

As to the legal authority of cellular carriers to set roaming rates for EAS service, we find no legal restriction prohibiting cellular carriers from engaging in re-rating of charges. In the case of cellular EAS, there is no extension of constructed facilities to other areas, merely provision of service using facilities owned by a foreign carrier. In any event, PU Code § 1001's prohibition of extension of facilties into a area served by an existing utility has more application in the traditional context of protecting franchised monopoly rights. By contrast, we are trying to encourage just the opposite result here. For the sake of clarity, however, we amend all CPCNs for cellular carriers to include a blanket authorization permitting EAS service anywhere within California.

We recognize that by setting EAS rates for service rendered outside its MSA, a cellular carrier may recover either more or less revenue from its customer that the home carrier itself pays to the serving carrier. On average, the goal should be that the cellular carrier is revenue neutral with respect to the transaction. In practice, any estimate is subject to error, and actual results may vary. Some carriers may realize a revenue surplus while others, a deficit. This is a risk of doing business. Of course, the specific rate levels set for EAS service shall remain subject to Commission approval consistent with our existing rate band guidelines, or subsequent rules adopted through this Investigation.

Carriers' re-rating of charges for EAS necessarily results in different charges being billed for similar use of air time by customers from different home carriers roaming within a single service area. The practice of re-rating charges in this manner does not constitute rate discrimination as prohibited in PU

Code § 453(c). Rate discrimination would involve a single carrier treating its own customers differently without any reasonable basis. By contrast, the differences in charges experienced by customers who roam from their own carrier's home service area involve service originating from different home carriers and is not discriminatory.

We agree with CRA that revenues from re-rating for EAS service should be shared in an equitable manner with cellular resellers in the interests of promoting a competitive market. This is consistent with our earlier finding in D.92-10-026 that for interconnection purposes, resellers are to be treated like cellular carriers. In practice, resellers have been treated in an inconsistent manner by cellular carriers. We find it reasonable to adopt the terms of the settlement into which CRA entered with McCaw/AT&T in A.93-08-035 as a basis for sharing of EAS revenue.

Findings of Fact

1. The Commission instituted an investigation into the mobile telecommunications industry on December 19, 1993.

2. The OII solicited respondents' comments on a variety of issues relating to development of a comprehensive regulatory framework for the MTS industry.

3. The OII indicated that issues would be identified which could be resolved on an expedited basis in advance of resolution of all other OII issues.

4. Based upon respondents' comments and the prior record developed in I.88-11-040, the following issues can be addressed without the need for evidentiary hearings: (a) market dominance of cellular carriers, (b) appropriateness of cost-of-service regulation, (c) unbundling of market-based rates capped at current levels, and (d) Extended Area Service (EAS) re-rating practices.

5. Respondents disagree on various issues in the OII including whether the market power of cellular carriers justifies continued regulatory oversight, and the form of regulation, if any, appropriate for regulating the MTS market (e.g. cost-based unbundling and price caps for cellular carriers).

6. The OII proposes a regulatory framework that classify MTS providers as either "dominant" or "nondominant."

7. A provider would be classified as "dominant" if it controlled essential facilities (constituting a bottleneck) to which other nondominant providers require access in order to serve customers.

8. At the present time, the only providers who meet the definition of dominant carriers are facilities-based cellular carriers.

9. The federal licensing of only two facilities-based duopolists who between them exclusively control the allocated cellular spectrum creates a radio transmission bottleneck.

10. Although control of bottleneck facilities generally is in the hands of a monopoly, the control can also be shared between duopolists.

11. The determination of whether regulatory oversight of cellular carriers should continue requires a assessment of their market power and ability to extract prices above competitive levels

12. The assessment of cellular carriers' market power requires a definition of the relevant market in which they operate.

13. The criteria for defining a market used by the the U.S. Department of Justice are generally recognized as valid and are appropriate for use in defining the cellular carriers' market.

14. Under the DOJ guidelines, a principle criterion in defining a market is identification of close substitutes for the product or service.

15. The most likely candidates for substitution with cellular service are emerging technologies such as PCS and ESMR services.

16. Although these new technologies offer promising prospects for becoming close substitutes for cellular on a wide basis in future years, their market is not sufficiently developed at the present nor is it likely to be in the near term future due to various market, technical, and regulatory impediments.

17. Given the anticipated time lag in full-scale deployment of alterantive technologies, the cellular carriers shall continue to exercise market dominance for the near term.

18. The cellular market is composed of a wholesale level restricted to two facilities-based licensed carriers and a retail level with relatively unrestricted entry by cellular resellers.

19. Cellular resellers' ability to compete against the facilities-based duopolists at the retail level is largely constrained since about 75% of resellers costs are controlled by the duopolists.

20. Cellular resellers' share of the market has been steadily declining over the last decade.

21. Cellular pricing patterns are relevant as an indicator of market power of cellular carriers.

22. High cellular prices, particularly in the largest California metropolitan markets, provide additional evidence of market power.

23. A 1992 study of cellular prices by the U.S. General Accounting Office found that "A market with only two producers--a duopoly market--is unlikely to have a competitively set price that is at or near the cost of producing the good."

24. Cellular carriers have generally developed two categories of billing options: (1) a "Basic Service" option which offers the maximium flexibility in usage or choice of carrier; and (2) various "Discount" options which generally entail restrictions as to usage or choice of carrier in exchange for targeted price discounts.

25. While an increasing share of subscribers have been migrating to discounted rate plans, a significant number continue to be billed under basic service plans.

26. While costs of cellular equipment have declined significantly over the past decade, the nominal rate for basic service has remained unchanged in most California cellular markets.

27. A study by the U.S. General Accounting Office found that duopolists set their best prices within 10% of each other in two-thirds of the nation's markets.

28. In California, the rates charged by duopolists for basic service are nearly identical or vary by no more than 11% between any two comparable rate plans.

29. A study by the National Cellular Resellers Association found that among the top 30 U.S. markets, LA. was the second highest and San Francisco was the seventh highest priced cellular market, based even upon the best rates available for 30 minutes of monthly airtime.

30. Although various carriers filed advice letters to reduce certain rates since adoption of pricing flexbility, most of those reductions were targeted to very specific user groups and were only temporary promotions which have since expired and provide no ongoing savings.

31. A particular reduction in a price or charge is not necessarily evidence of competitive pricing, but can simply be a response to changes in consumer demand, technology, or marginal costs.

32. Cellular carriers' costs in relation to prices provide another indicator of market power.

33. To the extent carriers can raise prices to levels well in excess of costs and command above-market returns on investment over an extended time period, this can be an indicator of insufficient competition.

34. As a general class of investments, cellular licensees offer returns among the highest available in the investment securities market, based upon 1991 data from the National Telecommunications Information Administration.

35. In a competitive market, excessively high returns would be expected to only be temporary as new competitors looking to maximize wealth discovered the high returns and entered the market, bidding down prices to garner a share of the high returns.

36. In the case of cellular carriers in major California markets, returns have remained at high levels over an extended period, compared with returns realized by other entities regulated by the CPUC.

37. In I.88-11-040, the DRA demonstrated that cellular carriers' returns exceeded returns of industries with comparable risks.

38. D.90-06-025 provided a guideline for detecting the profits which exceeded acceptable levels for cellular duopolists, by distinguishing profits explained by the scarcity of spectrum from profits due solely to a failure to compete.

39. Evidence of profits due to a failure to compete would be pricing of services so high as to discourage full system utilization or failure to invest in system expansion when it is economically justified.

40. While cellular usage and system expansion have grown dramatically over the past decade, this is indicative of the demographics of the market demand for cellular service during the earliest stages of the initial birth and growth of a new market.

41. In detecting whether cellular carriers profits reflect a failure to compete, the question is not whether expansion has occurred, but how much more rapidly expansion would have occurred had uncompetitively high prices not inhibited demand.

42. Despite the growth rate of cellular in California, still only about 5% of the population use a cellular phone.

43. According to a study by DRA, the L.A. market has an efficiency ratio of 635 subscribers per each frequency which is at least three times larger than the next largest market, indicating ample capacity for new subscribers, at least in other markets.

44. DRA's study found that even for the L.A. market, only certain parts were capacity constrained and would need significant investment to expand service.

45. With the growth among cellular carriers of digital technology as a replacement for analog, the previous constraints of spectrum scarcity should eventually be eliminated.

46. The presence of excessive duopoly rents extracted by cellular carriers is evident from the relatively high valuations which investors ascribe to the cellular spectrum compared with other spectrum valuations.

47. A 1991 Morgan Stanley Wall Street analyst report advised investors that an investment value for cellular spectrum of between $170 to $200 per POP was reasonable only because of the enormous returns possible from a shared-monopoly business.

48. By contrast to cellular spectrum, the valuation, spectrum used for SMR mobile communications was only valued at $42 per POP by MCI in its investment in NEXTEL.

49. In his testimony before the California Board of Equalization, the expert witness of LACTC testified that the high cellular license value is because of the market control provided by the FCC license and the resulting high earnings that result from the duopoly market in contrast to a competitive market structure.

50. As a result of market entry restrictions, lack of competitive substitutes, control over essential bottleneck facilities, uncompetitive pricing practices, excessively high duopoly rents, and cellular spectrum valuations, it can be seen that wholesale cellular carriers exert dominant market power.

51. The OII sets forth the policy goal that the radio transmission bottleneck should be made available on an unbundled basis from all other aspects of services cellular duopolists offer.

52. Beyond the mere publishing of unbundled rates, competing providers need the opportunity to interconnect into the cellular carriers' systems on a basis that does not place them at a competitive disadvantage.

53. Although there remain technical uncertainties as to the specific interconnection functions feasible for a reseller switch, we found in D.92-10-026 that market forces could be relied upon to influence when individual resellers elect to install a switch and no further showing of technical feasibilty was required.

54. It would require an excessive commitment of time and resources to undertake cost-of-service studies and to implement cost-based unbundling of rate elements for cellular service.

55. The comments filed in this investigation, together with the record developed in D.92-10-026, however, form a sufficent basis to implement a more limited market-based unbundling, based upon existing tariffed elements with prices capped at existing levels.

56. EAS is provided when a carrier serves a subscriber of another home carrier while the subscriber is temporarily roaming within the service territory of the foreign carrier.

57. In billing a subscriber for EAS service, the home carrier will re-rate the charges it incurs from the foreign carrier which may result either in an over or underrecovery of costs by the home carrier.

58. Certain parties, such as DRA, contend that carriers' CPCNs do not permit EAS service since it extends outside the authorized service territory specified in the CPCN.

59. Cellular resellers are to be treated as cellular carriers for interconnection purposes according to D.92-10-026.